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No. 84-251

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ELDEE EDWARDS, JR. *et al.*,
Petitioners,

v.

CONSOLIDATED RAIL CORPORATION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

WHETHER THERE EXIST SPECIAL AND IMPORTANT REASONS WHY THIS COURT SHOULD GRANT A WRIT OF CERTIORARI BECAUSE THE DECISIONS BELOW CONFLICT WITH SUBSTANTIVE CASE LAW AS ENUNCIATED BY THIS COURT AND FURTHER THE DECISIONS WERE REACHED BY THE TRIAL COURT'S DECIDING GENUINE ISSUES OF MATERIAL FACT, CONTRARY TO RULE 56 OF THE FEDERAL RULES OF CIVIL PROCEDURE, AND DENIED THE CHILD HIS RIGHT TO TRIAL BY JURY.

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SUMMARY OF ARGUMENT

Notwithstanding the court reorganization of February 1, 1971 and the establishment of the D.C. Court of Appeals as the expositor of case law in the District of Columbia, the decisions below in this case were clearly contrary to the direct import of this Court's decision in Best v. District of Columbia, 291 U.S. 411, 54 S.Ct. 487, 78L.Ed. 882 (1934). Where a child trespasser is injured by an artificial, dangerous condition on the land of another, questions of negligence and contributory negligence are for resolution by the jury. Even if the facts are undisputed, if the inferences from those facts could lead to different conclusions by fair-minded people, the ultimate questions should be settled by the jury. Id at 291 U.S. 415. The decision below to grant summary judgment for the defendant railroad misapplied the substantive law of the jurisdiction and was not correct.

The trial court's decision on the basis of Section 339 of the Restatement of Torts, Second was reached by deciding genuine issues of material fact in contravention of Rule 56 of the Federal Rules of Civil Procedure and in violation of the mandate of Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962) and the succeeding line of cases.

ARGUMENT

I. The decisions below conflict with substantive case law as enunciated by this Court and the United States Circuit Court of Appeals for the District of Columbia Circuit.

As respondent correctly notes, the court reorganization of 1971 established the D.C. Court of Appeals as the highest court of the District of Columbia and that court has adopted the rule that decisions of the federal court prior to the reorganization remain law until

overruled en banc by the D.C. Court of Appeals M.A.P. v. Ryan, 285 A.2d 310 (D.C. App., 1971). However, respondent mistates the meaning of Holland v. Baltimore & Ohio R. Co., 431 A.2d 597 (D.C. App., 1981) and concludes, erroneously that the lower court properly applied Section 339 of the Restatement of Torts, Second in granting Defendant's Motion for Summary Judgment.

In the first place, the holding in Holland was that the Attractive Nuisance Doctrine (Section 339), an exception to the general rule of landowner liability to trespassers as enunciated in Firfer v. United States, 93 U.S. App. D.C. 216, 208 F.2d 524 (D.C. Cir., 1953), does not apply to cases where trespassing children are injured by moving trains, i.e. -- rolling stock.

Secondly, the Holland court did not purport to overrule Best, Eastburn v. Levin, 72 U.S. App. D.C. 190, 113 F.2d 176 (D.C. Cir., 1940), McGettigan v. National Bank of Washington, 320 F.2d 703, cert. denied 375 U.S. 943, 84

S.Ct. 348, 11 L.Ed.2d 273 (D.C. Cir., 1963) or Hankins v. Southern Foundation Corporation, 216 F.Supp. 554 (D.D.C., 1963), affirmed 326 F.3d (D.C. Cir., 1963). Rather, each of these cases was analyzed as the law in this jurisdiction in light of which Section 339 of the Restatement of Torts, Second is to be understood. Petitioners rely on each and every one of these cases as the framework within which the tests or standards of Section 339 should be applied.

The Court's attention is directed to the fact patterns of each of the cases identified above; Best (5 year old falls through hole in wharf and drowns); Eastburn (8 year old injured while trespassing in a junk yard); McGettigan (9 year old injured by a flare taken by his brother from the abandoned building owned by defendant); and Hankins (child drowns after falling through ice over a ditch in a construction site). Respondent has pointedly not addressed the significance of these cases nor did the District or Circuit Courts understand that the holdings of

those cases compel the conclusion that, in cases such as this one, the issues of primary and contributory negligence are for resolution by the jury.

It is simply not conceivable that the D.C. Court of Appeals in Holland attempted, in dicta, to undo the clear import of Best and emasculate its progeny. Each of these cases recognizes that the inquiry into landowner liability for injuries to trespassing children involves an assessment of the peculiar circumstances of the individual case. This inquiry, of necessity, involves the determination of questions of fact or the meaning of inferences to be drawn from a particular set of facts. In the language of traditional negligence law, for example, the issue of "notice" to the defendant of prior like occurrences is a factual question and is for determination by the jury. Likewise, the tests or standards which are the subsections of Section 339 of the Restatement of Torts,

Second call for factual determinations. No fair reading of the Holland decision can be taken to mean that a trial judge should, or can, substitute his fact finding for that of the jury.

With respect to respondent's contention that the "hidden engine of destruction" argument is raised for the first time on appeal, the Court should note that this argument for landowner liability is based on Firfer, supra, which is the common law rule in this jurisdiction for an action arising ex delicto as was originally plead in the Complaint.

II The decisions below were reached by the trial court's deciding genuine issues of material fact, contrary to Rule 56 of the Federal Rules of Procedure.

Contrary to respondent's assertions, the decisions below were clearly erroneous in granting summary judgment in the face of D.C. Code Section 7-1434 which, by its plain language,

provides for strict liability against the railroad. Even assuming arguendo that the statute does not call for strict liability, it must call for some standard or it would not be on the books at all. The title of the section is "Liability of railroad companies for injuries". At a bare minimum, and still assuming it calls for a standard of something less than strict liability, the statute requires a factual inquiry into whether there was "any act or omission" on the part of the railroad which caused the injuries.

Under Rule 56 of the Federal Rules of Civil Procedure, the trial court may not grant summary judgment where there is a genuine issue as to any material fact. This Court has rigorously enforced that rule, Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962), Harlow v. Fitzgerald, 457 U.S., 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982) as have the courts below

Proctor v. State Farm Mutual Auto Ins. Co., 657 F.2d 308 (D.C. Cir., 1982); Davis v. Chevy Chase Financial Limited, 667 F.2d 160 (D.C. Cir. 1981); Mazaleski v. Truesdell, 562 F.2d 701 (D.C. Cir., 1977); National Association of Government Employees v. Campbell, et al., 593 F.2d 1023 (D.C. Cir., 1978); Merit Motors, Inc. v. Chrysler Corporation, 569 F.2d 666 (D.C. Cir., 1977); and Abraham v. Graphic Arts International Union, 660 F.2d 811 (D.C. Cir., 1981).

Whether there was any act or omission by the railroad in not fencing off the area where the child was injured is a question of fact for the jury to determine. Whether there was any act or omission by the railroad in maintaining power over a standing train at the location where the child was injured is a question of fact for the jury to determine. Whether there was any act or omission by the railroad in not posting signs warning of the electrical danger at the location where the child was injured is a

question of fact for the jury to determine. The finding of fact by a jury in the childs favor on any one of these issues would be dispositive of the railroad's liability under Code section 7-1434. The trial court's granting of summary judgment usurped the role of the jury in addressing the ultimate issue. The same argument holds true for the resolution of those questions or tests which are the subsections of Section 339 of the Restatement of Torts, Second. Each requires a finding of fact and so is for the jury.

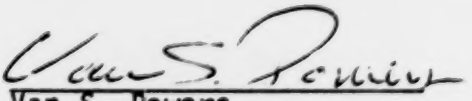
> "When reviewing a grant of summary judgment, we are, of course, obliged to view the record in the light most favorable to the party opposing the motion and to resolve all questions of inference in favor of the party. Fed. R. Civ. P. 56(c)" Poller at 368 U.S. 464, 473, 82 S.Ct. 486, 491, 7 L.Ed.2d 458 (1962).

CONCLUSION

There are special and important reasons for granting the Writ of Certiorari in that the minor Petitioner is one of but many trespassing children who have been horribly injured, maimed or killed as a result of coming in contact with, or close proximity to, the electrical catenary system in the northeastern states of the United States. As respondent asserts, it is true that petitioners are unwilling to rest content with an adverse decision, where, as here, the substantive and procedural rights and interests of the injured child have been abused.

The Petition for Writ of Certiorari should be granted.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of September, 1984, three copies of the foregoing Reply Brief to Brief in Opposition to Petition for Writ of Certiorari were hand delivered to the office of Stephen Trimble, Esquire and James B. Sarsfield, Esquire at 734 15th Street, N.W., Washington, D.C.

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